

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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Docket No. 13-0342 (AWA)

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In re:

LANCELOT KOLLMAN RAMOS, also known as
LANCELOT RAMOS and LANCELOT KOLLMAN,
an individual,

Respondent.

Before:

Janice K. Bullard, Administrative Law Judge

Appearances:

Colleen Carroll, Esq. for Complainant

William J. Cook, Esq. for Respondent

DECISION AND ORDER

I. INTRODUCTION

This Decision and Order is entered upon a hearing regarding a complaint filed by the Administrator of the Animal Plant Health Inspection Service (“APHIS”), an agency of the United States Department of Agriculture (“USDA”; “Complainant”) against Lancelot Kollman Ramos, also known as Lancelot Ramos and Lancelot Kollman (“Respondent”), alleging violations of the Animal Welfare Act, 7 U.S.C. §§2131 *et seq.* (“AWA”; “the Act”).

The AWA authorizes USDA through APHIS to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. §2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of

the AWA. 7. U.S.C. §2151. The Act and regulations fall within the enforcement authority of APHIS, which is also tasked to issue and renew licenses under the AWA.

This Decision and Order¹ is based upon the pleadings, documentary evidence, testamentary evidence, and arguments of the parties. The record in this proceeding is now closed, and the matter is ripe for adjudication.

II. ISSUE

The primary issue in controversy is whether Complainant has demonstrated that Respondent violated the Act and should be subject to civil money penalties and an Order to cease and desist engaging in conduct that violates the Act and its implementing regulations.

III. PROCEDURAL HISTORY

On September 10, 2013, Complainant filed a complaint against Respondent with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) for USDA. On September 26, 2013, Respondent filed a timely answer.

In his answer, Respondent raised defenses of laches and selective prosecution. Because this action is not based in equity, but rather represents a disciplinary administrative action, there is little basis for laches to attach to the claim.

With respect to the defense of selective prosecution, Governmental authorities have a broad range on discretion in enforcing the law. *United States v. Armstrong*, 517 U.S. 456, 463-64 (1996). However, government enforcement discretion is still subject to constitutional restrictions, such as discrimination based on race, religion, or any other arbitrary classification. *Armstrong*, 517 U.S. at 464. To prevail in a defense of selective prosecution, the Respondent must show:

- (1) defendants have been singled out while other similarly situated violators were left untouched, and (2) that the government selected defendants for

¹ In this Decision and Order, documents submitted by Complainant shall be denoted as “CX-#”; documents submitted by Respondent shall be denoted as “RX-#”; and references to the hearing transcript shall be denoted as “Tr. at -#”.

prosecution "invidious[ly] or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights."

United States v. Smithfield Foods, Inc., 969 F. Supp. 975, 984-85 (E.D. Va. 1997)

Respondent has not referred to any "protected group" in a similar situation which would not have been prosecuted by Complainant. Respondent did allege that the animal that is the subject of much of the instant adjudication died while in custody of a party that was not prosecuted by APHIS. However, Respondent provided no evidence that demonstrates that he was similarly situated to another party. Consequently, I am unable to conclude that Respondent was treated differently. Therefore, Respondent has not provided a basis for a claim of selective prosecution.

A hearing commenced in the instant matter on September 24, 2014, through audio-visual connection. Counsel for Complainant appeared at an audio-visual site in Washington, DC, counsel for Respondent and Respondent appeared at an audio-visual site in Palmetto, FL, and witnesses appeared at both sites. I presided over the hearing from a third audio-visual site. I admitted to the record Complainant's exhibits CX-1 through CX-22; CX 25 through CX-53 and Respondent's exhibits RX-1 through RX-17². The parties entered into stipulations of fact, which were stated at the hearing, and filed in a document on September 30, 2014, hereafter referred to as "ALJX-1"³. Complainant's and Respondent's exhibit and witness lists are hereby identified as ALJX-2 and ALJX-3, respectively, and entered into the record.

On October 13, 2014, the hearing transcript was filed with the Hearing Clerk for OALJ. Both parties' post-hearing briefs were filed on February 11, 2015.

On June 26, 2015, I instructed counsel for the parties to consult and compare Respondent's evidence, and send to me the documents that both had relied upon at the hearing. An expanded

² Respondent's exhibits were realigned so that all submissions referring to Dr. Schotman's reports appear at RX-7 to comport with Respondent's intention. See, Tr. at 118-125.

³ The transcript erroneously identifies "ALJX-1" as Complainant's list of exhibits. Tr. at 9.

version of Respondent's exhibit RX-7 had been used at the hearing by the parties, but was not in my possession. That document was sent to me, and is hereby made part of the record.

IV. SUMMARY OF THE EVIDENCE

1. Admissions

In his answer filed on September 26, 2013, Respondent admitted that his AWA license had been revoked upon default in a previous matter.

2. Stipulations

The parties stipulated that on or about November 5, 2009, Respondent had transported, sold, or negotiated the sale of certain animals described at ALJX-1. The documentary evidence identified by counsel that supports the stipulation is found at CS-5; CX-10 through 17; CX-19-20.

3. Documentary Evidence

The exhibits admitted to the record are described in the Exhibit lists that both parties filed, ALJX-2 and ALJX-3. In addition, Respondent filed duplicate copies of exhibits RX-1 through RX-12. On September 19, 2014, Respondent filed supplemental exhibits, RX-13 through RX-17⁴, which is hereby identified as "ALJX-4" and is hereby admitted to the record.

4. Summary of the Testimonial Evidence

Respondent Lancelot Kollman Ramos has worked as a circus performer and animal trainer his entire life. Tr. at 341. Respondent cared for his family's elephants and for numerous other elephants owned by several circuses and other individuals. Tr. at 348-349. In 2004, Respondent acquired Ned the elephant from William Woodcock, who was retiring from the circus. Tr. at 347. Mr. Kollman was aware of rumors that something was wrong with Ned, and he was aware that the animal was thin, but he did not know that it had any health problems. Tr. at 347. Respondent thought no one wanted Ned

⁴Respondent designates RX-17 as "All Exhibits listed by Complainant". The originally identified RX-13 was identically designated. Since neither constitutes actual exhibits submitted by Respondent, I have not duplicated Complainant's exhibits.

because he was castrated and couldn't be used for breeding. Tr. at 349. Respondent felt confident that he could care for Ned with the help of his veterinarian, Dr. Schotman, who had cared for Ned in the past. Tr. at 350.

After taking possession of the elephant, Mr. Kollman fed it with the diet that elephants he had worked with in the past liked to eat, but he gradually introduced grain into Ned's diet. Tr. at 353-355. One week after Ned ate grain, the animal developed lumps on his stomach and refused to drink water. Tr. at 355. Respondent consulted Dr. Schotman, who administered worm medicine. Id. Ned continued to refuse water, and Mr. Woodcock recommended feeding him muck from Respondent's pond. Tr. at 356. Although the advice made no sense to Respondent, he followed it, and Ned's appetite returned and he began to drink water again. Tr. at 357.

When Ned first moved to Respondent's property, he did well. Tr. at 357. Ned had been on concrete in the past, but he soon experienced recurring bouts of refusing to drink and eating dirt out of his pen. Tr. at 360. Respondent treated Ned's food with cilium to encourage the evacuation of the sand and dirt that Ned ate. Tr. at 361. Mr. Kollman described a "constant battle of eating the dirt, feeding him, trying to keep weight on him." Tr. at 362. Respondent consulted elephant veterinarians and experts across the country and abroad, but none were familiar with Ned's symptoms. Tr. at 362-363.

Dr. Schotman was involved in trying to determine the cause of Ned's problems, and made several recommendations for dietary changes. Tr. at 364. Ned's symptoms did not respond to beet pulp, hay, bran, corn, cracked corn, horse feed, or senior horse feed. Id. Ned was given the Mazuri brand of elephant feed, which contains 24% protein, but then developed bumps on the outside of his stomach that burst and became open wounds. Tr. at 365. Dr. Schotman conducted tests of Ned's

blood, stool, and urine, and Ned was tested for tuberculosis. Id. Eventually Dr. Schotman speculated that Ned had ulcers, and he prescribed 100 tablets daily of Tagament, which had no effect. Tr. at 366.

When Dr. Gaj visited Respondent in January, 2008, he observed that Ned looked thin, and Mr. Kollman told the doctor about Ned's problems. Tr. at 368-369. Dr. Gaj suggested consulting with Dr. Schotman, which was what Respondent had been doing. Tr. at 369. Mr. Kollman's regular inspector, Carol Porter, had not remarked on Ned's weight, although Mr. Koller told her of his issues. Tr. at 369-370.

In April, 2008, Respondent was given the opportunity for a job with an elephant in Bangor, Maine, and he thought that more exercise and a change of scenery would help Ned. Tr. at 367. Respondent was not concerned about transporting Ned because he thought he might improve with some stimulation, and he noticed that Ned appeared to have improved. Tr. at 367-368. Respondent did not believe it was necessary to weigh Ned, because he was able to gauge whether Ned lost or gained weight by visual inspection. Tr. at 372-373.

Respondent addressed Complainant's concerns about his tigers, explaining that one had clawed another on the bottom of the foot while they had been playing with a ball on the day before the inspection in October, 2008. Tr. at 379. Respondent separated the wounded animal from the others, as was the standard recommendation from Dr. Schotman. Tr. at 380. Respondent had called the doctor, but had not heard from him by the time the inspector arrived Tr. at 380-381.

Respondent explained that he had noticed a problem in the captive lion population, where lions develop wobbling, drooling, and other unusual symptoms. Tr. at 384. He was given two lions that developed the symptoms as they aged, and Dr. Schotman has been unable to diagnose a cause for the symptoms, or to develop an effective treatment. Tr. at 385. They had tried various diets and vitamins, but the lions eventually had to be euthanized. Tr. at 386.

Mr. Koller acquired two capuchin monkeys from a retired organ grinder, who gave them to him for his daughter shortly before the USDA inspection in October, 2008. Tr. at 386. The USDA inspector informed him that he needed a written program of enrichment for the monkeys, and Dr. Schotman provided a plan at Mr. Kollman's request. Tr. at 387.

Thomas B. Schotman has worked as a clinical veterinarian for thirty-three years, and has treated over a hundred different species of animals, including domestic pets, elephants, tigers, lions, bears and reptiles. Tr. at 400. Dr. Schotman first began treating elephants when he lived near Circus World, Florida, and was asked to come to the facility to look at their horses. Tr. at 400-401. Elephants require mostly routine veterinary care, like parasite control and vaccinations, and by the end of the 1980's Dr. Schotman was caring for forty-five privately owned elephants in their winter quarters in Florida, including Mr. Kollman's. Tr. at 402-403.

Dr. Schotman knew Ned since his birth, and saw him frequently after he was purchased by Mr. Woodcock. Tr. at 404-405. Ned did not have any apparent health issues that Dr. Schotman observed, and had normal physical examinations and was on a routine deworming and vaccination program. Tr. at 405-406. The doctor had observed no problems with the animal's nutrition, and he assessed Ned's body score as a four or five on a scale of nine. Tr. at 406-407.

At some point, Ned began eating dirt, which is characteristic of elephants with upset stomachs. Tr. at 407-408. Ned developed a chronic condition of not eating or drinking for a day or two, and then eating only roughage, despite treatments introduced by Mr. Kollman. Tr. at 409. The elephant ate a lot of hay, and it appeared as though grain would induce a setback. Tr. at 410. The elephant may have experienced pain or discomfort, and the veterinarian treated the animal with non-steroid anti-inflammatory medication. Id. Dr. Schotman and Mr. Kollman discussed Ned's diet many times, and the veterinarian recommended a diet that included palliative grain and access to roughage

at all times. Tr. at 411. Dr. Schotman noted Ned's symptoms and his treatment in his records. Tr. at 412-413; RX-7; CX-22. The doctor and Mr. Kollman tried a variety of diets and medications. Tr. at 413. At times, the veterinarian concluded that Ned had gained some weight and fecal tests were clear for parasites. Tr. at 417.

The doctor believed that Mr. Kollman took good care of his animals, and Respondent often called the doctor or another veterinarian to discuss problems. Tr. at 403. Dr. Schotman did not keep records of every telephone conversation that he had with Mr. Kollman, but he did communicate with him by phone frequently. Tr. at 404. Although blood work and examinations did not provide a cause for Ned's problem, Dr. Schotman discussed it with other veterinarians, who agreed that ulcers could have caused the condition. Tr. at 419. Dr. Schotman prescribed a product used for horses with ulcers, but that had no effect on the elephant's condition. Tr. at 420.

In January, 2008, Dr. Schotman was made aware that USDA's regional veterinarian, Dr. Gaj, had concerns about Ned's eating problems. Tr. at 422. Dr. Schotman sent a letter to Dr. Gaj to describe his treatment. Tr. at 422-423. The doctor spoke several times, but Dr. Schotman recalled talking more generally about tuberculosis. Id. Dr. Schotman continued to document Ned's ongoing diet problems later in 2008. Tr. at 424-425. Based on his examination in March, 2008, he believed that Ned was healthy enough to travel to Bangor, Maine, and to work in a show. Tr. at 429. Dr. Schotman concluded from his examination of Ned in September, 2008, that Ned was fit to travel to Columbus, Georgia for a show. Tt. at 430. Dr. Schotman believed that the animal had gained weight, and blood and fecal tests were normal, and it had not eaten dirt for some time. Tr. at 431. Dr. Schotman thought that Ned was improving. Id.

Dr. Schotman explained that he kept no record of an elephant's weight because it is an ordeal that involves finding a scale large enough. Tr. at 432. In his opinion, the actual weight is not as

important as being aware of the animal's body condition and weight gain or loss. Id. He assigns a body score based on the muscle mass, visibility of bones and size. Tr. at 433. The doctor was not concerned about Ned's general health because Mr. Kollman worked hard to set in place a good plan of nutrition. Tr. at 435.

Dr. Schotman noted on a report dated November 7, 2008, that he had spoken about Ned with Dr. Schmidt, a veterinarian for the Ringling Brothers. Tr. at 438-439. Dr. Schmidt and his associate Dr. Weidener had concluded that Ned had some kind of ulcerative disease that could not be firmly diagnosed. Tr. at 439. Dr. Schotman disagreed that only a minimal amount of diagnostic tests had been undertaken, explaining that no test could have been given to see the inside of the animal's stomach. Tr. at 440. An endoscopy would have put an elephant at risk as it would require general anesthesia, and an especially long scope. Tr. at 475. Ultrasound was not developed at that time to penetrate the thick hide of an elephant. Tr. at 477. Dr. Schotman agreed with Dr. Porter than an expert needed to be consulted, and Dr. Schotman believed that he had consulted experts. Tr. at 441. Dr. Schotman agreed that the quantity of food that Ned was eating would not be sufficient for a normal elephant, but Ned had periods of refusing to eat regardless of the quality or quantity of food offered. Tr. at 443-444.

At some point, Dr. Schotman agreed with Dr. Gaj that Ned should not be exhibited, as he had lost weight and was in a weak condition, but when he saw Ned on September 10, 2008, he believed the animal was well enough to travel. Tr. at 468-469; RX-7, at 44(a). Dr. Schotman reviewed pictures of Ned and testified that the animal's condition had appeared better when he examined the elephant some time previous to each photograph. Tr. at 483-485. The veterinarian denied that low mineral scores on Ned's tests indicated malnutrition. Tr. at 488-489. Dr. Schotman distinguished between

malnutrition due to inadequate diet, and the disease resulting from the animal's inability to process food that he was offered. Tr. at 489.

Dr. Schotman was aware that Ned was confiscated by USDA and moved to a facility in Tennessee where he died six months later. Tr. at 445. A post-mortem of the animal identified severe chronic ulceration of the bowel, which was consistent with the animal's symptoms. Tr. at 446. The scar tissue would have inhibited Ned's ability to absorb nutrients. Tr. at 490.

Dr. Schotman was familiar with Respondent's lions, which appeared to have cerebellar syndrome which caused ataxia. Tr. at 426. The doctor observed that other lions around the world were experiencing this problem, which he attributed to genetics. Tr. at 427. Dr. Schotman believed that Mr. Kollman's lions came from a breeder in Texas, and he postulated that the condition was caused by inbreeding. Tr. at 428.

On October 27, 2008, Dr. Schotman noted that Respondent had telephoned to report that one of his tigers had a bite wound on her forepaw that was draining and swelling. Tr. at 449-450; 459. The doctor prescribed an antibiotic and directed that she be brought to the veterinary hospital if she showed no improvement in five to seven days. Tr. at 450. Dr. Schotman prepared an environmental enrichment plan for capuchin monkeys that Mr. Kollman owned, and he discussed their diet and management with Respondent. Tr. at 451. He recalled examining them and testing them in September, 2008; and found them to be normal. Id. He did not know when Mr. Kollman first acquired them. Tr. at 455.

Dr. Susanne Brunkhorst is a veterinarian who has worked as a Veterinary Medical Officer ("VMO") for APHIS in the state of Tennessee for more than ten years. Tr. at 28. Before joining APHIS, Dr. Brunkhorst worked in her own veterinary practice for thirteen years. Tr. at 29. As part of her regular duties as VMO, on September 11, 2009, Dr. Brunkhorst inspected the Alternative

Livestock Auction in Cookeville, Tennessee, which is an animal auction that sells exotic animals. Tr. at 30. On the morning of her inspection, Dr. Brunkhorst received a phone call that notified her that lions and tigers were at the auction site. Tr. at 32-33. After checking in with the auction management, she went to find the lions and tigers and observed them in a trailer parked in an area designated for livestock trailers. Tr. at 34.

The trailer had an opening in the center that was blocked by panels tied with twine and she saw people standing next to those panels looking in the trailer and taking photographs of two lions and four tigers inside enclosures that were inside the trailer. Tr. at 35. The enclosures looked like large rolling metal cages. Tr. at 35-36. The onlookers denied any relationship to the animals, so Dr. Brunkhorst waited to see if anyone associated with the animals would arrive. Tr. at 36. Another licensee whom the inspector knew arrived, and agreed to find the animals' owner. Id. After Respondent arrived at the scene, Dr. Brunkhorst conducted "a travel inspection", which involved reviewing Respondent's records, inspecting the trailer, and taking pictures of the trailer and contents. Tr. at 37; CX-51.

Upon her inspection, Dr. Brunkhorst concluded that the trailer's ventilation was not sufficient for the animals during transport because the only ventilation provided was by opening the doors, which presented the risk of exposing the animals to noxious fumes and other environmental hazards. Tr. at 38. Dr. Brunkhorst prepared an inspection report that charged Respondent with violations of the Act and regulations. Tr. at 40; CX-26.

Dr. Brunkhorst was familiar with horse trailers that allow air to come in while the trailers are being driven, and she acknowledged that fumes and other environmental components could enter those trailers. Tr. at 44-45. Dr. Brunkhorst described the doors on Respondent's trailer as spanning the entire height of the trailer, and the opening being approximately one to one and one-half feet. She

observed two doors that were on the sides of the trailer, with one door towards the front of the trailer and one door towards the back of the trailer. Tr. at 47. Dr. Brunkhorst observed only one of the side doors open at the time of her inspection. Tr. at 49. Those doors were also open when the trailer was moved. Tr. at 50. Dr. Brunkhorst found no problem with the enclosures that contained the animals. Tr. at 48.

Jeffrey Kirlin enjoys taking photographs at events, and he has photographed “audiences at concerts, local galas, political events” and made the photos available through social media. Tr. at 52-53. Mr. Kirlin attended the Royal Hanneford Circus in April, 2008, and took photographs of behind the scenes at the circus over the course of several days, including photographs of an elephant that he later learned was called “Ned”. Tr. at 55. Mr. Kirlin talked to the elephant’s owner about taking the pictures and later provided pictures of the elephant to USDA employee Jim Finn, who also drafted Mr. Kirlin’s affidavit in January, 2009. Tr. at 56-57; CX-38. Mr. Kirlin recognized a photograph of Mr. Kollman as the individual with whom he spoke at the circus and as the elephant’s owner. Tr. at 60.

James Finn has worked as an investigator with USDA APHIS for thirty-six years. Tr. at 76. He is assigned to the New England geographic area, and in the ordinary course of his business assignments, had reason to look into the exhibition of Ned the elephant. Id. As part of his investigation, Mr. Finn interviewed Mr. Serge Landkas, who was involved in the exhibition of Ned. Id. Mr. Landkas recalled exhibiting Ned at an event in Georgia on September 13 and 14, 2008, under contract with Respondent, and recalled that Ned gave five performances and gave elephant rides. Tr. at 77.

Dr. Gregory Gaj is a supervisory animal care specialist for USDA APHIS. Tr. at 81. He has been in this position for twelve years and is responsible for supervising inspectors who conduct

animal welfare inspections in Florida, Georgia, Mississippi and Puerto Rico. Tr. at 82. Before he became a supervisor, Dr. Gaj was a field VMO for APHIS in the State of Arkansas for over eleven (11) years. Tr. at 83. Dr. Gaj also practiced veterinary medicine in private practice at Companion Animal Medicine and Emergency Medicine in Fort Worth and Arlington, Texas. Tr. at 83-84.

During 2008 and 2009, Dr. Gaj supervised Carol Porter, who was the animal care inspector for APHIS assigned to inspect Respondent's facility and animals. Tr. At 84. Dr. Gaj recalled accompanying Ms. Porter on inspections of Respondent's facilities on at least two occasions, the first of which occurred on January 10th, 2008. Id. During that inspection, the doctor observed that the elephant identified as Ned appeared thin and he discussed the issue with Respondent. Tr. at 85. The doctor told Respondent that he should try to get a baseline weight for Ned at a truck weight facility, so that Respondent could assess the animal's weight changes. Tr. at 86-87. Respondent told Dr. Gaj that he visually assessed Ned's weight. Tr. at 87.

Dr. Gaj attended another inspection in October, 2008, after APHIS received a complaint about Ned's condition, and afterwards he contacted Respondent's attending veterinarian, Dr. Schotman, to share his concerns about Ned's weight. Tr. at 85-87. Dr. Schotman revealed that to his knowledge, Respondent had not taken Ned to be weighed. Tr. at 87. Dr. Gaj believed that the animal had lost significant weight since the previous inspection, and he observed "sunken head, sunken areas around the whole body which indicated a loss of muscle mass. That the skin seemed to be hanging off of Ned, his ribs were prominent. His hips were very prominent, backbone very prominent." Tr. at 88-89. The difference in the animal's appearance between inspections was apparent in photographs, and ned seemed subdued and lethargic to Dr. Gaj. Tr. at 89; 101-102.

In his conversation with Dr. Schotman, Dr. Gaj asked questions about diagnostics and treatment for Ned, and was advised that routine blood work and fecal studies had been performed. Tr.

at 90. In Dr. Gaj's opinion, no attempt had been made to determine the cause of Ned's weight loss. Id. Dr. Schotman confirmed that the elephant's weight had been assessed only visually. Tr. at 91. Dr. Schotman also advised that Ned had been exhibited, and that he had provided a health certificate in prior months to Respondent. Id.

Dr. Gaj believed that Ned should not have been exhibited and explained, "When you have an animal that is extremely emaciated, that is exhibiting signs of severe weight loss, any stress could be incurred by traveling, by working the elephant, they would be more susceptible to additional problems if they are subjected to exercise and excessive exercise, working, travel". Tr. at 92. At the second inspection in October, 2008, Ms. Porter drafted an inspection report with input from Dr. Gaj that documented his observations and concerns about Ned's condition. Tr. at 92-94; CX-44.

Dr. Gaj testified that Ms. Porter spoke with Mr. Kollman about Ned's diet, and Mr. Kollman told Ms. Porter that he was feeding Ned about fifteen pounds of pellet ration, also known by its brand name, Mazuri. Tr. at 99. Dr. Gaj asked Respondent to demonstrate how much he was feeding the animal, and Respondent used scoops to show the amount of feed. Tr. at 100. When asked to weigh the feed, Respondent used a bathroom scale that showed that the pellets scooped by Respondent weighed closer to eleven pounds than fifteen. Id. Respondent also reported leaving timothy hay for Ned to eat in whatever amount he wished, and feeding it different vegetables. Tr. at 100-101. Respondent disclosed that Ned was eating a lot of sand and dirt, but Dr. Gaj did not discuss that with Dr. Schotman. Tr. at 101. Dr. Gaj could not determine why Ned had lost weight. Tr. at 158.

Dr. Gaj recalled that when he and Ms. Porter met Respondent at his home to review the results of their October 29, 2008, Respondent appeared agitated and upset with other USDA employees. Tr. at 113-114; CX-44. Dr. Gaj advised that he would not discuss Respondent's other cases, and eventually Mr. Kollman focused on their inspection. Tr. at 114. During his discussion,

Respondent made statements about killing every animal on his property, which Ms. Porter reported in a memorandum to her supervisors. Tr. at 114; CX-47. However, Dr. Gaj did not consider Respondent abusive to him or to Ms. Porter. Tr. at 152-153.

Dr. Gaj acknowledged that he reported no non-compliant items after his inspection of Respondent's enterprise in January, 2008, including no issues regarding Ned. Tr. at 117; RX-8. Dr. Gaj received a document dated January 14, 2008 from Dr. Schotman that reported that the veterinarian had observed that in the previous two years Ned began to eat dirt and exhibited symptoms of colic and anorexia. Tr. at 122; RX-7 page 53. Dr. Schotman reported that Ned then developed "protein bumps" on his abdomen when he ate grains, "which would precipitate more episodes of colic and anorexia". Tr. at 126-127; RX-7. Dr. Gaj denied that Dr. Schotman's reports put him on notice in January, 2008, that Ned had medical problems because "he's admitted that it was an enigma. He's admitted that this is just his thought that it might be the cause. I do agree that he did mention now about the protein bumps. But, not necessarily that Ned's condition and the severe weight loss is necessarily related to this." Tr. at 128. Dr. Gaj admitted that as of Dr. Schotman's report of January 14, 2008, he was aware that Ned periodically lost weight and ate dirt. Tr. at 129.

Dr. Gaj was aware that Ned was confiscated from Respondent and sent to the Elephant Sanctuary in Tennessee, but he was not involved in the confiscation. Tr. at 139. The doctor also knew that Ned died there and that a necropsy was performed, but he did not remember if he ever saw the necropsy results. Tr. at 139-140.

Dr. Gaj and Ms. Porter inspected other animals at Respondent's facility in October, 2008, including lions, tigers, and capuchin monkeys. Tr. at 94-95. Dr. Gaj noticed that a tiger appeared lame on the right front paw (CX-45; Tr. at 95-96) and observed a juvenile lion that appeared to have a stumbling gait, known as "ataxia" (Tr. at 95-96; CX-45). Dr. Gaj recalled that Respondent told him

that he had unsuccessfully tried to contact the attending veterinarian about the tiger, but he did not mention asking the veterinarian about the lion. Tr. at 96-97. Respondent told Dr. Gaj and Ms. Porter that he had not consulted his veterinarian immediately about the condition of the tiger, but had contacted him at some point. Tr. at 159; 151. Dr. Gaj did not confirm with Dr. Schotman whether Respondent consulted him about the lion or tiger. Tr. at 159.

Dr. Gaj testified that Respondent did not have a sufficient environmental enhancement plan for the non-human primates on the premises, the capuchins. Tr. at 98. The inspector observed that the animals had environmental enhancements, but there was no formal enhancement program in place. Tr. at 159. Dr. Gaj testified that his concern “was purely a lack of documentation for a program” for animals that Respondent had recently acquired. Id.

Dr. Genevieve Dumonceaux is a veterinarian who has been employed at the Palm Beach Zoo for three and a half years. Tr. at 171. She graduated from Veterinary school in 1988 and has since worked primarily in zoos, and has consulted nationally and internationally on issues involving elephants. Tr. at 171-172. Dr. Dumonceaux’s “experience with elephants ranges from a single elephant in a zoo to up to a herd of up to nine animals at one time in a larger zoo facility”. Tr. at 172-173.

The doctor examined Ned in early November, 2008, at Respondent’s facility somewhere near Brandon, Florida, at the request of APHIS personnel. Tr. at 173-174. Her examination was primarily visual, and she observed that the animal appeared very thin and emaciated, with a calm and quiet demeanor. Tr. at 175. Ned had some scars visible over the face, the head, at the point of the shoulders, hips and lower rear legs. Tr. at 175. Ned had a very sunken body, and his backbone, front legs, skull and face, tail bones and shoulder bones were prominent and visible. Tr. at 176. In the doctor’s opinion, Ned’s condition was not normal for a twenty year old elephant, which is considered

fairly young. Tr. at 176. Ned was underweight and appeared to lack normal musculature development. Tr. at 177. Dr. Dumonceaux assigned Ned a body condition score of "3" on a scale of 1 to 11, which is considered "emaciated" on that scale. Tr. at 182-183. She testified that she would have recommended that Ned not perform until his condition improved. Tr. at 177-178. The doctor was familiar with elephants which were used to give rides and the equipment used for that purpose. Tr. at 178. Ned's spine was prominent and there was little musculature to support the equipment. Tr. at 179. The doctor's findings were summarized in an affidavit that she signed. Tr. at 181-182; CX-42.

Dr. Dumonceaux would have started treatment of the animal's emaciation by trying to diagnose a cause for the condition, by collecting blood for a complete blood count and a serum chemistry evaluation, collecting urine for a urinalysis and feces for a parasite exam. Tr. at 186. She would have recommended a diet of hay available to him at all time and freely available water. Tr. at 186-187. She did not recall knowing Ned's diet. Tr. at 187. The doctor had observed some abnormality in Ned's feces that she would have investigated, and she saw evidence of some separation on the heels of his back feet and some pad separation and smoothness that she considered "less than ideal". Tr. at 189.

Dr. Dumonceaux did not observe Ned for a long time out of the trailer that was used to transport him to a new facility, but she administered some medication to protect him during the ride because she had some concerns about his ability to travel. Tr. at 184-185; 190. The doctor was concerned about the distance of the original destination for Ned, and his destination was changed to a closer place. Tr. at 190. She also recommended frequent rest stops to allow the animal to relax.

Dr. Dumonceaux did not see Ned again, and she did not speak with Respondent or his veterinarian, Dr. Schotman. Tr. at 191; 193. She did not review the animal's treatment records. Tr. at 192.

Dr. Denise Sofranko has worked with the USDA, APHIS Animal Care Service since 1988, and has been the agency's field specialist for elephants since 2003. Tr. at 198-199. She accompanied inspectors for APHIS during two inspections of Respondent's facility, and at the first visit in 2004, Dr. Sofranko observed the elephant Ned and found that he was in good physical shape. Tr. at 201. She next saw Ned on November 7, 2008, when she accompanied inspector Carol Porter to Respondent's facility to inspect the elephant at the request of APHIS' regional office and she observed that Ned was emaciated; and appeared lethargic. Tr. at 202. Dr. Sofranko spoke with Mr. Kollman, who became agitated and questioned Dr. Sofranko's presence. Tr. at 203; CX-35. Dr. Sofranko did not recall exactly what Respondent said other than that he yelled at her, used profanity, and called her names. Tr. at 204-205. Respondent did not approach her or Ms. Porter, but all were in close proximity. Tr. at 206. Dr. Sofranko moved away from Respondent in order to better see the elephant and Respondent continued to speak loudly to Ms. Porter. Tr. at 207.

Dr. Sofranko did not recall seeing any food in Ned's enclosure during her visit in November, 2008, but she saw a little Mazuri in a food storage bin that was not immediately available to the elephant. Tr. at 208-210. The witness viewed photographs taken at the inspection and confirmed that they were consistent with her observations of Ned at that time. Tr. at 211; CX-49. She acknowledged that hay appeared in the photograph, but she did not recall seeing it upon her arrival. Tr. at 211. Dr. Sofranko was aware that Ms. Porter drafted an inspection report, but the doctor did not consult with Ms. Porter about the report. Tr. 212-213; CX-48. Ms. Porter also prepared a second report and a notice of confiscation that she delivered to Respondent. Tr. at 213.

Ned was weighed on November 7, 2008, but Dr. Sofranko did not know whether he was weighed twice. Tr. at 215. She was present when Ned was weighed after USDA removed him from Respondent's facility and she saw the certificate of his weight at that time. Tr. at 216-217; CX-50.

Dr. Sofranko did not recall Ned's weight at first, explaining that it was derived by subtracting the weight of the empty truck from the weight of the truck with the elephant in it, which she believed yielded 7,260 pounds. Tr. at 217-218. To her recollection, Respondent did not have a record of Ned's weight, but he offered to immediately take him to be weighed when Ms. Porter asked him about Ned's weight on November 7, 2008. Tr. at 219.

USDA concluded that the Elephant Sanctuary was an appropriate place for Ned because APHIS personnel wanted to minimize his time in transit. Tr. at 220. Dr. Sofranko followed the trailer to the sanctuary and was present when he was unloaded. Tr. at 222-223. She stayed to make sure that Ned was comfortable. Tr. at 223. Dr. Sofranko had no conversations with Ned's veterinarian, and she did not arrange for his treating records to be sent to the sanctuary. Id. She did not communicate with the sanctuary about Ned's well-being after she left him there, but was aware that he had died and that a necropsy had been performed. Tr. at 224-225. The doctor did not recall the exact results of the necropsy, although she believed that the results were given to her by Dr. Brunkhorst, who is the inspector for the sanctuary. Tr. at 225. Dr. Sanfranko testified that any information about Ned's condition would have been verbally communicated to her, and she did not recall any specific reports about Ned having difficulty eating. Id. She did not know if Ned was weighed during his time at the sanctuary and could not say whether he had gained or lost weight while there. Tr. at 226.

Brian Franzen is licensed by the USDA to exhibit exotic animals, and he currently owns three elephants. Tr. at 297. Mr. Franzen has known Respondent for twenty-five years, and was familiar with Respondent's elephant Ned. Tr. at 298. He knew Ned when the elephant was owned by Mr. Woodcock, and he noticed that Ned was tall, but had not "filled out". Id. In Mr. Franzen's opinion a large bull elephant such as Ned should have been husky, and not lanky. Tr. at 298-299. Mr. Franzen was aware that Ned had trouble putting weight on even before Mr. Kollman owned him, and that all

of his owners had tried different kinds of food in efforts to put weight on the animal. Tr. at 299. Mr. Franzen had visited Respondent's property and saw Ned, and observed hay, grain and water available for the animal. Tr. at 300.

Respondent discussed Ned's condition many times with Mr. Franzen and other elephant owners. Tr. at 300-301. Respondent spoke with Mr. Franzen's veterinarian, Dr. Mark Wilson, as well as veterinarians Dr. Schotman and Dr. Dennis Schmidt. Tr. at 301. Mr. Franzen and others discussed worming techniques, and Mr. Franzen brought hay from Wisconsin because it is of better quality than hay from Florida. Tr. at 302. Ned wasn't interested in the hay, though Mr. Franzen's elephants were enthusiastic about it. Id. In Mr. Franzen's opinion, Respondent was very committed to Ned and actively tried to solve the animal's weight problem. Tr. at 302-303. Everyone in the elephant industry was concerned about Ned and discussed what could have been done for the animal. Tr. at 304-305.

Mr. Franzen did not know exactly what Respondent fed the elephant, but every time Mr. Franzen visited, he saw that hay, grain, fruits and vegetables were available for Ned. Tr. at 309. Mr. Franzen was aware that Ned was eating dirt, and he testified that his own elephants often eat dirt. Tr. at 309-310. Mr. Franzen did not think that Ned needed to be weighed because an elephant's weight can vary greatly, and the process of taking them to be weighed creates safety and liability issues. Tr. at 306-307. He explained, "unless you have your own scale right in your yard, [it] is very difficult. You've got to go to a truck stop or somewhere, you have to keep the public away, which is very difficult." Tr. at 307.

Mr. Franzen acknowledged that Ned looked "visibly unappealing", which "might have a negative effect to the public", but he explained that elephants benefit from the stimulation and variety of travel. Tr. at 313. He denied that transporting elephants is stressful to them, and cited to a study

completed by a team of veterinarians who measured the effects of travel on elephants' health. Tr. at 314-315.

Terry Frisco has been an elephant trainer for over thirty years and has known Respondent for twenty years. Tr. at 322. He knew Ned well and was aware that the elephant had trouble keeping weight on. Tr. at 323. Mr. Frisco lives close to Respondent and visited him frequently. Tr. at 335. Mr. Frisco was familiar with Respondent's care for Ned , and he knew that Mr. Kollman had traveled far to get hay for the animal. Tr. at 323. Mr. Frisco thought that it was ill advised of Respondent to acquire Ned because of how thin he was, and he advised Respondent to give Ned a variety of different foods. Tr. at 324. Respondent tried many things to keep Ned from eating dirt, which was the animal's habit before Respondent acquired it. Tr. at 325.

Mr. Frisco talked with Dr. Schotman about Ned's weight and they speculated whether Ned had eaten something that was stuck in his intestines, or if he had ulcers. Tr. at 326. It is hard to find X-ray equipment for an elephant that size. Tr. at 327. Dr. Schotman was the veterinarian for Mr. Frisco's elephants for more than twenty years, and Mr. Frisco considered Dr. Schotman a well-qualified veterinarian experienced with elephants. Tr. at 328. Other vets consult Dr. Schotman, and elephant owners consult him even when they have other vets. Tr. at 329.

Before Ned was confiscated, Respondent called Mr. Frisco frequently to express concern about Ned's health and weight. Tr. at 336. Mr. Frisco did not know Ned's weight, but he observed that elephants that don't feel well can lose weight by not drinking water. Id.

V. DISCUSSION

1. Non-Interference with APHIS Employees, 9 C.F.R. § 2.4

In a memorandum dated November 18, 2008, ACI Carol Porter summarized the events of November 7th, 2008, when APHIS conducted an inspection of Respondent's facility prior to issuing

a notice to confiscate Respondent's elephant. CX-18. Ms. Porter reported that Mr. Kollman became "agitated" about the inspection, and became "verbally abusive" regarding Dr. Sofranko's presence on his property. Id. Dr. Sofranko testified that Respondent used profanities and was hostile to her. Tr. at 204-205. Respondent admitted that he was upset and "probably owe[d Dr. Sofranko] an apology." Tr. at 376.

The record establishes that Respondent was rude and upset when dealing with APHIS inspectors. However, Respondent's reaction is just one matter addressed in Dr. Porter's November 18, 2008, memorandum, and the record fails to establish that Ms. Porter or Dr. Sofranko were intimidated by Mr. Kollman when he objected to being told he was starving his elephant. CX-18. APHIS employees remained on the facility and interacted with Mr. Kollman and returned later to serve a notice to confiscate the elephant and again to carry out the confiscation. Dr. Sofranko recalled the incident, but was unable to say with any certainty that she reported the incident to supervisors (see, Tr. at 229, where Dr. Sofranko testified that she "believed" she reported the incident and "would have" reported it to her supervisor). In her affidavit, Dr. Sofranko describes Mr. Kollman as angry, but also described ignoring him. CX-35.

I find that Complainant has failed to establish a violation of 9 C.F.R. § 2.4. by a preponderance of the evidence. In a case where an individual similarly interacted heatedly with inspectors, the Judicial Officer for the USDA upheld the Administrative Law Judge's determination of no violation of 9 C.F.R. § 2.4. The Judicial Officer found that rudeness alone did not constitute abuse, without concomitant reports and other indicia by inspectors consistent with being abused. See, In re: AWA Docket No. 03-0034 Martine Colette, an individual; Wildlife Waystation, a California corporation; and Robert H. Lorsch, an individual, August 21, 2009, 68 Agric. Dec. 768.

2. Requirement to be Licensed, 9 C.F.R. § 2.1(a); Prohibition Against Buying, Selling, Transporting, Exhibiting or Delivering for Transportation during Period of License Suspension or Revocation, 9 C.F.R. § 2.10(c)

The stipulated facts, together with CX-1 through CX-12; CX-15 through CX-21; RX-13; RX-14, and the Respondent's testimony, establish that Respondent was a licensed exhibitor under the AWA until October 19, 2009, when the revocation of his license No. 58-C-0816 became effective. The evidence further demonstrates that after that date, Respondent sold and transported animals subject to the Act. I give little weight to the evidence establishing that APHIS gave other individuals time to dispose of animals before their license revocation became effective. Respondent did not have a similar agreement with APHIS. Accordingly, the alleged violations of the Act and regulations for activities involving the sale and transportation of animals without a license have been established.

3. Handling of Animals,⁵ 9 C.F.R. 2.131(b)(1)

Complainant has alleged that Respondent failed to handle the elephant Ned as carefully as possible when he exhibited Ned while the animal was visibly emaciated and in compromised health. I credit Mr. Kollman's explanation that he thought that the elephant would benefit from a change of scene when he brought the animal to Maine in April, 2008. See, CX-38; 39. In her inspection report from October 29, 2008, Carol Porter observed that although Ned was thin at her previous inspection of January 10, 2007, he "was under veterinary treatment...and was improving". CX-44. However, despite Dr. Schotman approving Ned for travel in September, 2008, the record demonstrates that the animal's condition had deteriorated substantially. CX-52; CX-45. In October, 2008, Ms. Porter believed that Ned should not be exhibited or allowed to travel. CX-44.

Ms. Porter's conclusion is bolstered by Dr. Dumonceaux's opinions regarding the elephant's emaciated condition in November, 2008 (CX-42). The photographic evidence supports the doctor's

⁵ Respondent was also charged with failing to feed Ned an adequate diet in violation of 9 C.F.R. 2.131(b) (1). However, the complaint specifically charges Respondent with a violation of feeding regulations, and I find it appropriate to consolidate my discussions of allegations regarding feeding.

conclusion that the elephant's condition was poor (CX-49) and had worsened over time (CX-52). I reject the testimony that the animal was merely "visually unappealing" and conclude that even before the inspection in October, 2008, Respondent should have realized that Ned was in poor condition and that using him to give rides and perform in a circus was bad judgment. The animal had experienced recurring symptoms of eating dirt, refusing to eat or drink, and, and obvious loss of weight, and it should have been apparent that past exhibition of Ned had not enhanced the animal's condition. Although Dr. Schotman noted on October 2, 2008, that Ned had gained weight (CX-22, page 2; RX-7), there is little of record with which to compare weight gain. The photographic evidence from later in October, 2008, is contrary to the doctor's conclusions. See, CX-52.

I find that by exhibiting Ned the elephant at an event in Georgia in September, 2008, Respondent failed to handle an animal as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm or unnecessary discomfort in violation of the regulations.

The record does not sufficiently establish that the elephant's shelter at Respondent's facility was inadequate. In a memorandum dated October 31, 2008, Ms. Porter reported that she had observed Ned "trembling" on October 29, 2008, and that Mr. Kollman believed it was because Ned was cold. CX-46. However, the inspection of January, 2008, did not cite Respondent with violations of Ned's housing, and Ms. Porter's November, 2008 inspection reports did not specifically address his housing. CX-43; CX-48.

I conclude from the totality of the evidence that Dr. Porter's allegation of a violation of 9 C.F.R. 1.131(b)(1) in her inspection reports of November 7, 2008, referred to the exhibition of the elephant. See, CX-43; CX-48. In addition, Ms. Porter's memorandum of November 18, 2008, focused on lack of documentation of the animal's weight changes and the circumstances surrounding

the confiscation. CX-18. Moreover, the complaint does not specifically refer to a violation due to the animal's temperature. The preponderance of the evidence does not demonstrate that Respondent failed to handle an animal properly because of Ned's housing.

4. Veterinary Care, 9 C.F.R. § 2.40(b)(2)

I find that the record clearly establishes that Respondent attempted to provide Ned the elephant with adequate veterinary care. The attending veterinarian, Dr. Schotman credibly testified that he was aware of the chronic problem involving the elephant's weight and eating disorder, and that various treatments were given to resolve the problem. Dr. Schotman's clinical records document that Ned was given deworming, antibiotics, banamine for pain, peptobismol, mineral oil, electrolytes, and other measures to address symptoms. RX-7. Dr. Gaj conceded that Dr. Schotman was qualified to serve as attending veterinarian, and that his treatment of the elephant appeared "reasonable at the time". Tr. at 132.

Although Complainant's witnesses asserted that additional diagnostic measures could have been taken to assess Ned's condition and find a cure, Dr. Gaj did not suggest a specific test. The diagnostic tools that Dr. Dumonceaux recommended (blood count, serum chemistry evaluation, urine and fecal analysis) were the tests that Dr. Schotman had conducted. Tr. at 186. Dr. Dumonceaux's recommended diagnostic tests and diet were consistent with how Ned was treated and fed. I accord substantial weight to Dr. Schotman's explanation, corroborated by elephant expert Mr. Frisco, that no scan or other kind of test was available to make a definite diagnosis. Dr. Schotman's conclusion, bolstered by Dr. Schmidt and Dr. Weidner, that the animal suffered from some kind of ulcerative condition of the intestines proved correct, as necropsy revealed.

The preponderance of the evidence demonstrates that Respondent sought the opinion of other elephant experts and veterinarians about the cause of Ned's chronic digestive problem. Dr. Schotman

consulted elephant veterinarians Drs. Schmidt and Weidner, who suspected that ulcers caused Ned's problems. Tr. at 439. Neither Inspector Portman nor Dr. Gaj provided specific suggestions to treat Ned's condition other than to demand that the animal be weighed. Dr. Gaj believed that a baseline weight would have been helpful in assessing Ned's progress. Mr. Kollman, Mr. Franzen and Dr. Schotman testified that an elephant's weight changes could be visually determined. Ms. Porter also was able to visually make an assessment of the elephant's weight, since Dr. Gaj testified that at the time of her inspection in January, 2008, she believed the animal had gained weight. Tr. at 143. Dr. Gaj also made observations about Ned's weight from physical inspection alone. Tr. at 86; 88.

Although the inconvenience of weighing Ned is insufficient reason to ignore the instructions of Ms. Porter and Dr. Gaj, I find that the record fails to demonstrate how Ned would have benefited from being weighed. The animal was finally weighed on November 7, 2008, when it was confiscated. CX-50. The weighing of the animal did not improve its health, as demonstrated by the statements of a veterinarian who examined Ned on December 26, 2008, at the Elephant Sanctuary and assigned him a body score of "2", "indicating an emaciated animal". CX-40. Mr. Kollman and Dr. Schotman clearly and demonstrably were concerned about Ned's weight and chronic eating problem. The most compelling evidence that weighing the elephant had no impact on its condition is the fact that it died after being confiscated from Respondent.

The preponderance of the evidence does not establish that Respondent failed to provide adequate veterinary care to Ned in violation of 9 C.F.R. 2.40(a)(1).

Respondent has also been charged with failing to provide adequate care to a tiger that had injured its left front paw. Inspectors observed the animal's injury, and the credible evidence establishes that Dr. Schotman was aware of the tiger's injury. RX-7. The evidence on this issue is in equipoise, and does not establish a violation.

Respondent has further been charged with failing to provide adequate care to a lion with an uncoordinated gait. Dr. Gaj testified that lions with similar symptoms could have been treated if the condition was due to a Vitamin A deficiency. Tr. at 151. However, Dr. Schotman credibly testified that he believed the condition was congenital and ultimately untreatable. Tr. at 427. The evidence is in equipoise and insufficient to establish that Respondent failed to provide adequate veterinary care to his lions.

5. Environmental Enrichment Plan, 9 C.F.R. §§ 2.100(a) and 3.81

The evidence is uncontested that Respondent did not have an environmental enrichment plan in place for two capuchin monkeys. Although Dr. Gaj and Dr. Schotman agreed that the monkeys were provided with psychological enrichment, Mr. Kollman did not have a plan as required by the regulations. Respondent was in violation of this regulatory mandate.

6. Diet, 9 C.F.R. 3.129

The record is replete with references to the elephant's chronic digestive problems and the efforts to find a palatable diet that would encourage the elephant's growth. The testimony of elephant experts familiar with Ned, as well as the testimony and treatment records of the animal's treating veterinarian, makes it clear that Respondent tried many different approaches to meet Ned's nutritional needs.

Dr. Gaj testified that Ned appeared very thin from his visual inspection of the elephant in January, 2008, and he believed that Mr. Kollman should have weighed the elephant. Tr. at 141. He testified that the amount of elephant pellet that Ned was being fed constituted a maintenance diet, which was not sufficient given the elephant's apparent emaciation. Tr. at 136. Dr. Gaj did not contact Dr. Schotman and advise that he believed that the animal's diet was insufficient. Tr. at 230. Dr. Gaj could not explain Ms. Porter's rationale for charging Respondent with a violation of regulations

pertaining to the animal's diet, but he noted that the amount of feed that Respondent reported was more than was actually found upon inspection. Tr. at Dr. Gaj could not say whether the difference in the amount of feed would have improved the diet, and speculated that perhaps "a nutritionist or, you know, a veterinarian that's, practicing veterinarian that's experienced with elephants might be able to tell you that, but I'm not in a position to be able to tell you that." Tr. at 233.

I give little weight to Dr. Gaj's suggestion that a nutritionist may have helped sort out the animal's diet. The record fails to demonstrate that the doctor made that suggestion to Respondent or Dr. Schotman at any time. Moreover, Dr. Gaj also speculated that an elephant specialist may have given dietary advice. I credit Dr. Schotman's testimony about his experience with elephants, and his discussion with other veterinarians familiar with elephants, and find that Respondent did consult elephant specialists. Dr. Schotman had not recommended that Mr. Kollman consult a nutritionist, and he doubted that a change in diet would have benefited the animal, given the amount of lesions present in the elephant's intestines. Tr. at 488-489.

I credit the evidence that inspectors did not find an abundance of food for Ned upon their inspection in October, 2008. However, there is other equally credible evidence from Dr. Schotman and elephant trainers Franzen and Frisco that supports Respondent's contention that he kept a fresh supply of food for the animal. In addition, the record clearly establishes that both Ms. Porter and Dr. Gaj were made aware that Mazuri elephant feed caused the elephant to produce "protein bumps", thereby supporting Respondent's decision to provide Ned with less of that type of sustenance. Tr. at 382. This particular evidence is in equipoise.

The documentary and testamentary evidence establishes that some of the traditional feed for elephants exacerbated Ned's symptoms. Respondent gradually introduced certain foods to the animal, to avoid onset of symptoms. It is clear that the animal suffered from some chronic gastric

condition that existed before its acquisition by Respondent and that continued beyond its confiscation by USDA. The record fails to disclose what Ned was fed at the Tennessee Elephant Sanctuary, but he died soon after his relocation to that facility. I conclude that Ned's diet was not the cause of his failure to thrive.

Respondent's efforts to care for the elephant are entirely credible. I accord substantial weight to his testimony:

Well, it's a little bit of a sentimental situation, because I don't think that, how can you, how can you explain this feeling, when an animal makes you feel as tall as the Empire State Building? How did the, this being around this animal and taking care of them, they even, and doing this totally as washing him, just the privilege to be around him, is, is like an honor. You know? He's, this animal was basically like, you could say a religious god to me.

Tr. at 374-375.

The preponderance of evidence fails to establish that Ned's diet was inadequate due to Respondent's actions

7. Mode of Transportation, 9 C.F.R. § 2.100(a)

The complaint cites to 9 C.F.R. § 3.81, which requires environment enhancement to promote psychological well-being of nonhuman primates, rather than 9 C.F.R. §3.138, which addresses the cargo space of the primary conveyance used to transport live animals. Because the complaint provides a rationale for the allegation, Respondent had notice of the condition being charged as non-compliant, and in fact, defended the charge at the hearing. Accordingly, the complaint is hereby amended to conform to the evidence.

Dr. Brunkhorst believed that the trailer that Respondent used to transport felids in Tennessee did not provide enough ventilation unless doors were open, in which case the animals did not have sufficient protection. She was concerned that the animals would be exposed to road debris when the trailer was in motion. Respondent acknowledged that the under half of the doors on the trailer were

kept open while traveling and when stationary. Tr. at 341. Respondent has used similar trailers to transport animals “hundreds, even thousands” of times. Tr. at 342.

I accord equal weight to the testimony of Dr. Brunkhorst and Mr. Kollman. Dr. Brunkhorst explained her concerns for the well-being of the animals during transport in Respondent’s vehicle. Respondent explained that he had transported animals numerous times without being charged with a violation of the Act or regulations. The inspections of record of Respondent’s facilities did not disclose a violation of transportation regulations. I find that the evidence is in equipoise and fails to establish a violation of 9 C.F.R. § 3.138.

8. Sanctions

Since July, 2014, Bernadette Juarez has been the Director for the Animal and Plant Health Inspection Service, Investigative and Enforcement Services. Tr. at 499. From 2009 to 2014, she served as the Deputy Director for Investigative and Enforcement Services, and from 2002 to 2009, she was an attorney in USDA's Office of the General Counsel. Id. Ms. Juarez considered four factors mandated by the AWA in making a recommendation for penalties under the statute. Tr. at 505. She considered the size of Respondent’s business to be “small” and observed that her conclusion was supported by prior determinations of the Judicial Officer. Tr. at 506. I credit her opinion on this issue.

She considered the gravity of the violations, some of which she believed were “grave” (verbal abuse of inspector, Tr. at 508; failure to handle animals as carefully as possible, Tr. at 510; some of which she believed were “serious” (environmental enhancement plan for capuchin monkey, Tr. at 507; unlicensed transfer of animals, Tr. at 510; the type of vehicle used to haul animals, Tr. at 519); and some in which she reached factual conclusions from the evidence while failing to assign a “value of gravity” to her conclusions..

I place little weight on most of Ms. Juarez' testimony regarding the gravity of the violations. Her recommendations are grounded in her personal assessment of the weight of the evidence.⁶ Ms. Juarez' opinions ranged from whether the evidence on the whole showed that an elephant and lion had been provided proper veterinary treatment (Tr. at 232-234) to whether the elephant was given proper nutrition (Tr. at 516-517). She is not a veterinary medicine expert, and her testimony is often not well supported by the testimony of the witnesses who hold degrees in veterinary medicine. For instance, the record does not demonstrate that Complainant's veterinary inspectors had recommended a consultation with a nutritionist, but Ms. Juarez concludes that Respondent's failure to do so demonstrates failure to provide adequate veterinary care. Most of the testimony about the need for a nutritionist was speculative and adduced on cross-examination at the hearing.

Ms. Juarez made conclusions of fact and law about whether the evidence substantiated the allegation that Respondent had not provided veterinary care for an injury to a tiger's paw. See, Tr. at 506-507. In addition, rather than referring to the observations that veterinary medical inspector Dr. Brunkhorst relied upon when citing Respondent with violations of animal transport conveyances, Ms. Juarez provided her own grounds for finding Respondent in violation of that regulation. Tr. at 518-519.

I credit Ms. Juarez' testimony about the significance of Respondent's prior history of violations, to some degree. I take official notice of a consent decision and order in AWA Docket Number 99-0041, in *Ramos*, No. 99-0041, 59 Agric. Dec. 296 (U.S.D.A. June 23, 200)(Consent Decision and Order) (CX-53) and of the rulings in other actions involving APHIS and Respondent. CX-1; CX-2; CX-3; CX-4; CX-8; CX-32. I decline to accord substantial weight to the administrative enforcement action that resulted from a default decision wherein the substantive allegations were not

⁶ One example of her fact finding: "I do acknowledge that Mr. Ramos worked with Dr. Schotman to try to provide the care that he believed was appropriate for Ned. I balanced that with the facts of the case and the prior history that we have here." Tr. at 523.

litigated. Tr. at 520. I also find merit in Ms. Juarez' opinion regarding Respondent's lack of good faith, considering his transportation and sale of animals after his license was revoked.

Ms. Juarez testified that in each instance where Respondent violated a cease and desist Order, the statute requires the assessment of an additional penalty of one thousand, six hundred and fifty dollars (\$1,650.00). Tr. at 524. She recommended the imposition of a cease and desist Order and civil money penalty. Tr. at 529-560. Ms. Juarez declined to propose a specific amount for the penalty.

Respondent argued for mitigation of sanctions in this matter, noting that he and Dr. Schotman had treated the elephant for ulcers, which was ultimately determined to be the cause of its death. Tr. at 378. He regretted his behavior towards Dr. Sofranko, but explained that he was "destroyed" when USDA confiscated Ned. Tr. at 377.

I find that the record supports the imposition of a civil money penalty in the amount of \$5,000.00 for the willful failure to handle an animal as carefully as possible, relative to Ned's exhibition in September, 2008. I further find that the imposition of an additional penalty of \$1,650.00 for violation of a previous cease and desist order is appropriate.

In making my assessment of penalties, I have considered that Respondent has suffered the loss of his animal, although the value of an ailing animal is difficult to ascertain. It is clear from the record that APHIS sought to shield Ned from further exhibition while in a deteriorated state, but it is not at all certain that some action short of confiscation could not have guaranteed that outcome. Certainly, the removal of the animal from Respondent did not assure its improved health and longevity, as it died at its new home.

VI. FINDINGS OF FACT

1. Respondent did not interfere with, threaten, abuse (verbally) or harass an APHIS official in violation of 9 C.F.R. § 2.4.

2. Petitioner's AWA license 58-C-0816 was revoked when default judgment was entered against him in an enforcement action initiated by APHIS and inadequately defended by Petitioner.
3. From October 19, 2009 through on or about November 8, 2009, Respondent operated as a dealer in violation of section 2134 of the Act (7 U.C.C. § 2134) and sections 2.1(a) and 2.10(c) of the Regulations with respect to transporting and selling twenty-six tigers, one liger, two camels, two llamas, and two zebras for use in exhibition, because his AWA license had been revoked.
4. On or about September 13 and 14, 2008, Respondent violated 2.131(b)(1) when he exhibited the elephant Ned, while the animal was in poor physical condition and health, as demonstrated by recurring bouts of symptoms of gastric distress.
5. Respondent did not violate the Act or regulations by failing to use appropriate methods to prevent, control, diagnose, and treat diseases and injuries or by failing to have available emergency, weekend and holiday care with respect to the elephant Ned, pursuant to 9 C.F.R. § 2.40(b)(2).
6. Respondent did not violate the Act or Regulations by failing to use appropriate methods to prevent, control, diagnose, and treat diseases and injuries or by failing to have available emergency, weekend and holiday care with respect to a lion, pursuant to 9 C.F.R. § 2.40(b)(2).
7. Respondent did not violate the Act or regulations by failing to provide wholesome, palatable food of sufficient quantity and nutritive value, pursuant to 9 C.F.R. § 3.129.
8. Respondent did not fail to comply with standards for the humane transportation of animals because of the configuration of the vehicle used to convey animals in violation of 9 C.F.R. § 2.100(a) or 9 C.F.R. § 3.138.

9. Respondent failed to timely provide a written plan of environment enhancement to promote the psychological well-being of non-human primates in violation of 9 C.F.R. §3.81.
10. Respondent knowingly failed to obey a cease and desist order when he exhibited an animal that was in poor condition, thereby violating regulations regarding careful handling of animals.

VII. CONCLUSIONS OF LAW

1. The Secretary, USDA, has jurisdiction in this matter.
2. Respondent willfully violated the AWA.
3. Respondent's failure to obey a cease and desist order merits the imposition of a penalty of \$1,650.00.
4. Respondent's willful failure to handle an animal as carefully as possible in September, 2008, warrants the imposition of a civil money penalty of \$5,000.00.

ORDER

Lancelot Kollman Ramos, also known as Lancelot Ramos and Lancelot Kollman, Respondent, and his agents, employees, successors and assigns, directly or indirectly through any individual, corporate or other device is hereby ORDERED to cease and desist from further violations of the Act and controlling regulations.

Lancelot Kollman Ramos, also known as Lancelot Ramos and Lancelot Kollman, Respondent, shall pay a civil money penalty of six-thousand, six-hundred and fifty dollars (\$6,650.00). Within thirty (30) days from the effective date of this Order, Respondent shall send a certified check or money order in that amount made payable to the Treasurer of the United States to the following address:

USDA APHIS GENERAL
P.O. Box 979043

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent's payment shall include a notation of the docket number of this proceeding.

This Decision and Order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

So Ordered this 14th day of July, 2015.

[Redacted]
Janice K. Bullard
Administrative Law Judge